No. 88-1707

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN ZIMMERMANN,

Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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QUESTION PRESENTED

Whether D.R. 7-107 of the Tennessee Code of Professional Responsibility violates the free speech clause of the first amendment of the Constitution of the United States when applied to punish a District Attorney for responding to press inquiries during two criminal cases in which he was acting as prosecutor with information already available to the public, there being no finding that the statements presented a clear and present danger to the fair trials or sentencing of the defendants.

The Supreme Court of Tennessee answered this question in the negative.

THE PARTIES

The names of the parties to the proceeding are contained in the caption. In addition, the National District Attorneys Association, The Tennessee District Attorneys General Conference and the Tennessee Association of Criminal Defense Lawyers filed briefs as amicus curiae.

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v.

BOARD OF PROFESSIONAL RESPONSIBILITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

John Zimmermann, the Petitioner, appeals from the final judgment of the Supreme Court of Tennessee, dated January 23, 1989, holding that D.R. 7-107 of the Tennessee Code of Professional Responsibility, as applied in this case does not violate Petitioner's right of free speech as guaranteed by the first amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, dated January 23, 1989, is reported at 764 S.W. 2d 757. It is reprinted in Appendix A hereto. The final judgment of the Chancery Court for Davidson County, Part III, in case No. 86-2120-III, dated May 28, 1987,

is not reported. It is reprinted in Appendix B. The judgment of the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee, dated August 22, 1986, is not reported. It is reprinted in Appendix C.

JURISDICTION

The judgment of the Supreme Court of Tennessee, upholding the constitutionality of D.R. 7-107 and affirming the judgment of the Chancery Court for Davidson County finding Petitioner to be in technical violation of Disciplinary Rule 7-107(B) and (E) and sustaining the verdict of the Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee, was entered on January 23, 1989. (Appendix A).

This Petition is being docketed in this Court within ninety (90) days from the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES

1. First Amendment, United States Constitution:

> Congress shall make no law*** abridging the freedom of speech***.

2. D.R. 7-107, Tennessee Code of Professional Responsibility:

> Trial Publicity

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of a public communication and that does more than state without elaboration:

(1) Information contained in public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter should not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the sentence or the merits of the case.

(C) D.R. 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of D.R. 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent

and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of D.R. 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under D.R. 7-107.

HOW THE FEDERAL QUESTION WAS RAISED

At every stage of the proceedings below, Petitioner presented, by brief and oral argument, the federal constitutional claim as stated in this Petition. The Hearing Panel rejected Petitioner's claim as follows:

> . . . several courts have held that the first amendment of the Constitution requires a more restrictive interpretation of D.R. 7-107 in order to adequately protect the right of free speech. Basically, those courts have adopted one of the three tests to be used in interpreting an attorney's extrajudicial com-

ments under D.R. 7-107. The three tests differ with regard to the degree of threatened harm required before discipline can be imposed:

(1) Whether the comments posed a "serious and eminent threat" to the fair trial of a defendant;

(2) Whether the comments posed a "clear and present danger" to the fair trial of a defendant;

(3) Whether the comments posed a "reasonable likelihood" of interfering with the fair trial of a defendant.

Until the Tennessee Supreme Court amends the language of D.R. 7-107 or furnishes other guidelines for interpreting its applicability to extrajudicial statements in criminal cases, the Hearing Committee must look to the present provisions of the rule and circumstances of each case. For the reasons stated herein, the Hearing Committee recommends a private reprimand in this case. (Appendix C, pp. 30a-31a).

The Chancery Court, on Appeal, found that "the Respondent's insistence that he is protected in making statements attributed to him by the first amendment to the Constitution is not tenable," (Appendix B, p. 22a). The Chancery Court further indicated that attorneys were not "aware of the definite impact of the rules" and recognized that direction from the Supreme Court was necessary to provide "complete understanding of what is to be expected of the parties," (Appendix B, p. 23a). The Tennessee Supreme

Court questioned "whether D.R. 7-107, as applied in the present case, violates the freedom of expression rights secured by the United States and Tennessee Constitutions" and answered "[w]e are of the opinion that it does not." (Appendix A, p. 7a). It thus considered and expressly rejected this federal constitutional claim.

STATEMENT OF THE CASE

Petitioner seeks review of the judgment of the Supreme Court of Tennessee upholding the constitutionality of D.R. 7-107 of the Tennessee Code of Professional Responsibility and affirming the judgment of the Chancery Court for Davidson County, finding Petitioner to be in technical violation of D.R. 7-107(B) and (E) and sustaining the verdict of the Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee, Disciplinary District.

The Petitioner, John Zimmermann, is an Assistant District Attorney for the 20th Judicial District, Davidson County, Tennessee. In June of 1984, a preliminary hearing took place involving Larry Sheffield, a male prostitute, who confessed to the brutal first degree murder of a quadriplegic veteran in a Nashville cemetery. Immediately following the hearing, Zimmermann was confronted by reporters asking questions at which time several statements were attributed to him by the local newspapers. The only statements attributed to Zimmermann that discussed information not disclosed in the preliminary hearing concerned the findings of the Medical Examiner and photographs of the body. These were:

> "The Medical Examiner said (Campbell) was strangled, stabbed in the chest multiple times and had his throat slashed all the way across."
>
> "The photographs of the body were pretty bad. We are considering asking for the death penalty."

The cause of death was not a contested issue, nor was the Medical Examiner's description of the injuries disputed. The autopsy report is a public record under Tennessee law and had no bearing on the guilt or innocence of the defendant. The photographs in question were never displayed or offered to the media by Zimmermann and they were, therefore, not disseminated to the public.

Mr. Jim Weatherly, the Metro Nashville Public Defender, filed a complaint with the Tennessee Board of Professional Responsibility on July 5, 1984 contending that Zimmerman's statements made following Sheffield's preliminary hearing violated D.R. 7-107(B). Zimmermann filed a timely response.

In October of 1984, Dwayne Haynes and Richard Emmett were convicted in separate jury trials of assault with the intent to commit first degree murder, aggravated kidnapping, aggravated rape, armed robbery, and first degree burglary. The victim was an 82 year old senior citizen volunteer worker. After the jury trial and prior to the hearing before the sentencing judge, reporters questioned Zimmermann about both cases and attributed the following statements to him in a local newspaper:

> "I think these verdicts speak the mind of the jury for the community, in that crimes

> like this against the elderly are not going to be tolerated."
>
> ". . . will ask Judge Sterling Gray in a sentencing hearing . . . to impose the maximum sentences on Emmett and Haynes and to order those terms consecutive."
>
> "This woman suffered torture at the hands of these two men for about three hours. . . . As far as I am concerned, there is nothing worse they could have done short of killing her."

On March 26, 1985, Mr. Weatherly filed a second complaint with the Tennessee Board of Professional Responsibility contending that Zimmerman's statements made after the trial and prior to the sentencing hearing violated D.R. 7-107(E). Zimmermann filed another timely response.

The Disciplinary Board recommended a public censure against Zimmermann and he appealed, requesting a formal hearing before a three lawyer Hearing Panel for the Board of Professional Responsibility, pursuant to his rights under state procedural rules. In accordance with this request, the Board presented Zimmermann with a formal Petition for Discipline on December 5, 1985. He filed a timely answer on January 8, 1986. The matter came before the Hearing Panel on June 16, 1986.

District Attorney General Tom Shriver testified at the disciplinary hearing that it was the policy of his office to be open and candid with all members of the press within the permissible bounds of the disciplinary rules. Judge Sterling Gray testified at the disciplinary hearing that he was not aware of any extra-judicial statements made by Zimmerman and that he was not

influenced by anything said or done by him outside of the courtroom.

Although the Hearing Panel was uncertain of the constitutional standard to be applied to D.R. 7-107, it concluded in its August 22, 1968 judgment that Zimmermann violated D.R. 7-107(B) to a limited extent, and recommended that he receive a private reprimand only for the extrajudicial comments made in the Sheffield matter concerning the examination and report of the Medical Examiner and photographs of the body. The Hearing Panel found that the comments made in the Haynes matter prior to the sentencing hearing were not likely to affect the imposition of sentence in the case and therefore did not violate D.R. 7-107(E). Significantly, the Hearing Panel recognized that the overbreadth of D.R. 7-107(B) made it constitutionally suspect and requested guidance from the Tennessee Supreme Court so it could better determine when extrajudicial comments warranted discipline. (Appendix C, pp. 29a-31a).

Zimmerman appealed to the Chancery Court for Davidson County, Tennessee, Part III. Chancellor Designate, Aaron C. Brown, heard the appeal on April 1, 1987, and issued his finding on April 9, 1987. Even though the Chancellor was uncertain of the appropriate constitutional standard and asked the Tennessee Supreme Court to establish guidelines for the bench and bar as to when extrajudicial statements should be punished under the disciplinary rules, he confirmed the Hearing Panel's finding that a technical violation of D.R. 7-107(B) and (E) had occurred. (Appendix B).

Zimmerman appealed to the Supreme Court of Tennessee which issued a split opinion on January 23,

1989. Even though both the Hearing Panel and the Chancery Court found D.R. 7-107 unclear and constitutionally suspect and sought guidance from the Supreme Court of Tennessee, the majority opinion announced that "the rule is explicit."

While noting that courts in various jurisdictions have adopted different constitutional standards, the Tennessee Supreme Court reasoned that since the Rule itself makes reference to "the statements a 'reasonable person' might make, 'reasonably likely' to interfere with a fair trial," the rule should be interpreted to prohibit speech which is "reasonably likely" to interfere with or affect a fair trial. (Appendix A, p. 12a). Justice Frank F. Drowota, III sharply dissented from the decision finding that the disciplinary rule was overbroad under the first amendment to the United States Constitution. (Appendix A, p. 14a) He correctly pointed out that: (1) the citation to a "reasonable person" found in D.R. 7-107(A), (B), (D), (E), (G), and (H) has nothing to do with the extrajudicial statement of counsel but refers to what "a reasonable person would expect to be disseminated by means of public communication;" that (2) the "reasonable person" reference in D.R. 7-107(B) has nothing to do with giving guidance to the bar concerning extrajudicial statements made prior to trial; and that (3) "reasonably likely" is not found in D.R. 7-107(B) which is the relevant Section in this lawsuit; therefore, the Rule is not explicit. (Appendix A, pp. 19a-20a).

Justice Drowota also noted that the majority opinion creates a chilling effect on prosecutors and stifles the public's right to know. The bench and bar sought guidance from the Tennessee Supreme Court and re-

ceived none. Rather than refusing to provide guidelines, Justice Drowota urged the adoption of a standard which balances the rights of the accused to a fair trial with the right of a free press and the public's right to information and knowledge. Justice Drowota reasoned that the "clear and present danger" standard struck the proper balance among the prosecutor's right to speak, the right of the public and the press to have access to information, and the rights of the individual accused of a crime to a fair trial. (Appendix A, pp. 20a-21a).

The Hearing Committee, Chancery Court and Supreme Court all emphasized that Zimmermann did not intend to interfere with the fairness of the trial and sentencing hearing and that his desire to comply with the appropriate ethical standards was apparent.

REASON FOR GRANTING THE PETITION

This case presents a constitutional issue of fundamental importance to every practicing attorney in the nation on which the courts are in conflict: What may an attorney say without violating Disciplinary Rule 7-107? That is, what constitutional standard must be applied to D.R. 7-107 to properly balance an attorney's first amendment right to free speech and the public's right to information with a defendant's right to a fair trial?

1. *The Supreme Court of Tennessee, in this case, has departed from principles well established by the Supreme Court in the contempt by publication cases.*

The United States Supreme Court has consistently held that freedom of expression may be restricted only when, under certain circumstances, the speech poses a "clear and present danger" to an important

governmental interest. See *e.g., Wood v. Georgia*, 370 U.S. 875 (1962). The American Bar Association Committee on Standards for Criminal Justice has analyzed the "clear and present danger" standard in the fair trial-free press setting as follows:

> The clear and present danger test undeniably has had a checkered history in the Supreme Court. Two considerations, however, put this concern to rest. First, despite the fluctuations associated with the clear and present danger test in the national security cases, *there is at least one line of decisions in which it has been applied with consistency and with a sensitivity to the* first amendment *values that recommend it to the fair trial/free press setting: the contempt by publication cases* beginning with *Bridges v. California* [314 U.S. 252 (1941)]. Second, in any event, the clear and present danger test appears to have been revived in recent years, and in its revitalized form it embodies the elements of the four-step analysis. . . . ABA Standards for Criminal Justice, 2d Edition, Volume II 8-11 (emphasis added).

The four-step analysis asks the following questions: (1) Does the restriction advance a legitimate governmental interest? (2) Does the public comment pose an extremely serious threat to the governmental interest sought to be protected? (3) Does the threat appear likely to occur immediately? and (4) Is the restriction on public comment necessary to secure the protection or advancement of the governmental interest in jeopardy. *Id.* at 8-10. This four-step analysis is found in *Landmark Communications, Inc. v. Virginia*, 435 U.S.

829, 845, 56 L. Ed. 2d 1, 98 S.Ct. 1535 (1978), which reaffirmed the "clear and present danger" test as applied to the use of the contempt power to punish out-of-court statements. *See, e.g., Wood v. Georgia*, 370 U.S. 375, 8 L. Ed. 2d 569, 82 S.Ct. 1364 (1962); *Craig v. Harney*, 331 U.S. 367, 91, L. Ed. 1546, 67 S.Ct. 1249 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 90 L. Ed. 1295, 66 S.Ct. 1029 (1946); and *Bridges v. California*, 314 U.S. 252, 86 L. Ed. 192, 62 S.Ct. 190 (1941). The issue in these cases had been solely whether a contempt citation could stand because of a clear and present danger that the comment in pending litigation imperiled impartial administration of justice. The working principal which emerged is that the substantive evil must be serious and the degree of imminence high before utterances can be punished. *See, also,* Strong, *Fifty Years of Clear and Present Danger: from Schenck to Brandenburg and Beyond*, Sup. Ct. Rev. 41 (1969).

The contempt by publication cases are similar to the instant case in that the basic concerns are fair trials, free speech, and the public's right to know. Petitioner is unaware of other applicable cases which have come before the United States Supreme Court except *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966), which adopts no standard. The Fourth Circuit, in *Hirschkop v. Snead*, 594 F. 2d 356 (4th Cir. 1979) *en banc*, concluded that *Sheppard v. Maxwell* signaled a departure by the United States Supreme Court from the "clear and present danger" test to a standard of whether a lawyer's comments are "reasonably likely" to endanger a fair trial. The Petitioner contends that this Court did not approve a shift from the "clear and present

danger" standard in *Sheppard v. Maxwell.* The majority opinion of the Tennessee Supreme Court is in direct conflict with this Court's decisions which have refused punishment and prior restraint unless the statements posed a "clear and present danger" to a legitimate government interest. Has the Supreme Court implicitly approved a shift from the clear and present danger standard in *Sheppard v. Maxwell*? If so, the standard is unclear as demonstrated by the conflict among the circuits and states.

2. *The decision of the Supreme Court of Tennessee in this case, holding that D.R. 7-107 is constitutional without application of any restrictive standard, is in conflict with the decision of Federal Circuit Courts and other State courts.*

Every court, except the Tennessee Supreme Court, which has been confronted with a challenge to a rule identical to D.R. 7-107 has held that the rule is overbroad under the first amendment. The courts are in conflict, however, as to the standard to be applied in limiting such statements so that the rule will pass muster under the first amendment. Most courts have opted for granting a standard to be applied in determining when such extrajudicial comments may be barred consistent with the first amendment. Those standards are as follows:

> (a) Whether the comments posed a "clear and present danger" to a fair trial;
>
> (b) Whether the comments posed a "serious and imminent threat" to a fair trial;
>
> (c) Whether the comments posed a "reasonable likelihood" of interfering with a fair trial.

In *Markfield v. The Association of Bar of City of New York*, 370 N.Y.S. 2d 82 (A.D. 1975) the court held that an attorney's extrajudicial statements may be punished only when those statements pose a clear and present danger to a fair trial. That standard has been applied by other courts regarding statements by attorneys and participants. See, *Bailey v. Systems Innovations, Inc.*, 852 F.2d 93 (3rd Cir. 1988); *Levine v. United States*, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158, 90 L.Ed.2d 719, 106 S.Ct. 2276 (1986); *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987); *United States v. Lahder-Rivas*, 669 F.Supp. 1563 (M.D. Fla. 1987).

In the case of *Chicago Counsel of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. den.* 427 U.S. 912, the court held that a local federal rule, patterned after D.R. 7-107, was unconstitutionally overbroad under the first amendment. The court held that before a lawyer could be punished for extrajudicial statements a court must find that the lawyer's statements actually threatened the fair administration of justice by posing a "serious and imminent threat" to a fair trial, 522 F.2d at 242. The following courts have adopted the "serious and imminent threat" test to its disciplinary rules: *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) *en banc*; *Ruggieri v. Johns-Manville Products Corp.*, 503 F.Supp. 1036 (D.R.I. 1980); *Shadid v. Jackson*, 521 F.Supp. 85 (E.D. Tex. 1981); *United States v. Garcia*, 456 F.Supp. 1354 (D.P.R. 1978); *In re Lasswell*, 673 P.2d 855 (Ore. 1983); *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 492 N.E.2d 1327 (1986).

A minority of courts have held that while the rule is unconstitutionally overbroad, they would neverthe-

less graft a standard requiring a determination that the lawyer's statements posed a "reasonable likelihood" of interfering with a defendant's fair trial rights. See *Hirschkop v. Sneed*, 594 F.2d 356 (4th Cir. 1979) *en banc*: *In re Rachmiel*, 449 A.2d 505 (N.J. 1982). The *Hirschkop* minority, however, took issue with the "reasonable likelihood" standard and advocated the use of the "clear and present danger" test. *Id.* at 379. While the *Hirschkop* majority concluded that the "reasonable likelihood" standard was implicitly approved in *Sheppard v. Maxwell*, Judges Winter and Butzner opined that "it is unlikely that the Court implicitly approved a shift from the clear and present danger standard . . . to a reasonable likelihood standard . . . without ever commenting on the subject." *Id.* at 380.

The dissenting judges further observed that since D.R. 7-107 operates prospectively:

> When a lawyer speaks about a pending case, he frequently does not know how the case will develop, how his remarks will be interpreted and reported, how much community interest will arise, or what steps the trial judge will take to avoid prejudice. Therefore, a lawyer can only speculate whether his comments might later be judged to have created a reasonable likelihood of prejudice because of contingencies that he might not foresee. Under these circumstances, the prudent course is to avoid all comment . . . . *Threatened with professional disgrace, lawyers must restrict their speech "to that which is unquestionably safe." This sweeping proscription offends the first amendment. Id.* at 380,

quoting Baggett v. Bullit, 377 U.S. 360, 372 (1964) (emphasis added).

Another approach was taken by the Montana Supreme Court in the case of *In the Matter of Robert S. Keller*, 693 P.2d 1211 (Mont. 1984). The *Keller* court held that while the attorney's statements directly violated D.R. 7-107, the disciplinary rule itself failed to set forth any constitutional standards consistent with the first amendment. The Court dismissed the disciplinary action finding that under the first amendment the disciplinary rule was overbroad on its face, refusing to graft any constitutional standard into the rule.

In the instant case, the majority of the Tennessee Supreme Court rejected the urgings by the Hearing Committee and the trial judge, all of whom requested guidelines consistent with the first amendment. The majority stated: "We have no difficulty in finding adequate guidelines consistent within the context of the rule itself." (Appendix A, p. 12a). Justice Drowota pointed out in his sharp and vigorous dissent that this response was inadequate under the first amendment and that their reasoning was faulty. (Appendix A, p. 19a-21a). Justice Drowota asserted that the "clear and present danger" rule is the only constitutional standard which is consistent with the decisions of the United States Supreme Court:

> The bench and bar have asked for guidance in interpreting DR 7-107's applicability to extrajudicial statements. I am of the opinion that we should adopt a standard which balances the rights of the accused to a fair trial with the right of a free press and the public's right to information and knowledge.

> The majority opinion states "that it would be prudent for the District Attorney to review his 'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate." This reasoning by the majority is why I feel guidelines for DR 7-107(B) should be established by this Court. The majority opinion does what respondent seeks to avoid—a stifling of the public's right to know by creating a chilling effect on prosecutors with the suggestion to "review his 'open policy with the media'." There is a delicate balance between a prosecutor's right to speak and the right of the public and the press to have access to information, and the rights of the individual accused of a crime and a defendant's right to a fair trial. I am of the opinion that Zimmermann's statements should be reviewed by the test of "whether his comments posed a clear and present danger to the fair trial of the defendant." Under such a test, it is clear that Zimmermann's statements to the media did not pose a clear and present danger to the defendant's fair trial and he did not violate DR 7-107. (Appendix A, pp. 20a-21a).

The issue of gag orders and other prior restraints which the courts may impose upon attorneys and litigants continues to generate litigation. Courts are requesting guidance from the United States Supreme Court. See *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W.Va. 1988) (noting the absence of guidance from the U.S. Supreme Court regarding the appropriate first amendment standard to be applied).

3. *Disciplinary Rule 7-107 should be governed by a national standard approved by this Court.* Attorneys' first amendment rights must be protected by this Court. Without a national standard, the States are free to impose what amounts to an absolute restriction of speech, as the Supreme Court of Tennessee has done in this case. In addition, it is not uncommon for attorneys to have a multi-state practice, but their first amendment rights should not fluctuate when they cross the state lines. Since each state now applies a different first amendment standard, attorneys are faced with needless uncertainty about their fundamental rights. This uncertainty mandates that attorneys remain silent or face considerable professional risks.

The commentators, while not in agreement on the appropriate standard to be applied to D.R. 7-107, all recognize the critical importance of attorneys' rights to free speech. The Reardon Report which gave rise to D.R. 7-107 recognized that freedom of speech and press are fundamental liberties guaranteed by the United States Constitution which must be zealously preserved. Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, preamble (approved draft, 1968). The Goodwin Committee, later formed by the American Bar Association's Standing Committee on Association Standards for Criminal Justice to re-evaluate the attorney comment standards, first classified public comment about criminal proceedings as "pure speech" then declared that such comment "enjoys the strongest possible presumption of first amendment protections." ABA Standards for Criminal Justice, 2d Edition, Vol-

ume II 8-1.1, page 8-9. In 1980, the American Board Association's Commission on Evaluation of Professional Standards, known as the Kutak Commission, recommended substantial changes of D.R. 7-107 in light of *Hirschkop, Chicago Council of Lawyers* and the Goodwin Report. As a result, Model Rule 3.6 now incorporates a stricter standard of "substantial likelihood of materially prejudicing an adjudicative proceeding." The comment to Model Rule 3.6 states that:

> There are vital societal interests served by the free dissemination of information about events having legal consequence and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation of public policy.

The Kutak Commission notes that the Model Rule's "substantial likelihood" standard is an improvement over D.R. 7-107 because the Supreme Court has consistently invoked the "clear and present danger" standard to test the validity of suppressions of speech and that the Model Rule incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality. *See, Bridges v. California*, 314 U.S. 252, 273, 86 L. Ed. 192, 62 S.Ct. 190 (1941) ("Neither inherent tendency nor reasonable tendency is enough to justify a restriction of free expression."). Significantly, no Supreme Court decision has employed a "reasonable

likelihood" standard to test the validity of a content-based restriction of free speech. *Hirschkop*, 594 F.2d at 378-379; L. Tribe, *American Constitutional Law*, § 12-11 (1979).

Laurence Tribe, in his treatise *American Constitutional Law*, § 12-11, expressed the following concerns about rules which proscribe broad categories of statements:

> . . . restrictions of this kind are grossly overinclusive since the actual risk that a trial's result will be tainted by such publicity is slight. Only a small percentage of criminal cases ever reach a jury, most jury trials generate no publicity, and much crime news goes unnoticed. Moreover, mere exposure to the facts of a case, including prejudicial information, does not automatically disqualify a juror from rendering an impartial verdict, particularly if the prejudicial information is later admitted as evidence at trial.

The commentators' concern with overbroad restrictions on attorneys' speech is valid. The Supreme Court of Tennessee made no attempt to clarify which comments are permissible under D.R. 7-107. The majority opinion only advised that "it would be prudent for the District Attorney to review his 'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate." (Appendix A, p. 7a). Justice Drowota correctly states that the majority reasoning does what should be avoided, that is: "a stifling of the public's right to know by creating a chilling effect on prosecutors with the suggestion to "review his 'open policy with the media.' " (Ap-

pendix A, p. 20a). Thus, without Supreme Court intervention, attorneys' important first amendment rights are ignored.

The preceding discussion, the cases and the commentary show that the issues presented for review are far from settled. Attorneys are uncertain of their rights and in light of this uncertainty, it is fundamentally unfair to punish rather than guide them. Zimmermann represents lawyers as we hope them to be, in that he wants to do what is right, he had no intention of influencing the trial in an improper manner, and he believed as he spoke to the press that he was within the Rule. This case is an appropriate one in which to clarify the appropriate constitutional standard to be applied to D.R. 7-107. Until this Court imposes such a standard, the courts will remain in conflict and first amendment rights will vary from jurisdiction to jurisdiction.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted:

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APPENDIX

APPENDIX A

THE SUPREME COURT OF TENNESSEE AT NASHVILLE

S/C No. 87-47-I

IN RE: JOHN ZIMMERMANN,
An Attorney Licensed and Admitted to the Practice of Law in Tennessee,
Respondent/Appellant,

v

BOARD OF PROFESSIONAL RESPONSIBILITY-
Appellant.

For Publication
January 23, 1989

DAVIDSON COUNTY

Hon. Aaron Brown, Chancellor,

FOR RESPONDENT/ APPELLANT:

William M. Leech, Jr.
Corabel Alexander
WALLER, LANSDEN, DORTCH & DAVIS
Nashville, Tennessee

National District Attorneys Association and Tennessee Attorneys General Conference
Amici Curiae

FOR APPELLANT:

Joseph L. Mercer, II
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Harold Levinson,
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Nashville, Tennessee

Tennessee Assocation of Criminal Defense Lawyers
Amicus Curiae
Nashville, Tennessee

OPINION

JUDGMENT OF LOWER COURT AFFIRMED O'BRIEN, J.

There are appeals by each of the parties in this action which derives from a Board of Professional Responsibility petition for discipline against John Zimmermann who is a duly licensed and practicing attorney in the State of Tennessee. At the time these proceedings were initiated the respondent was a member of the staff of the District Attorney General for Davidson County. A complaint was received from the Metropolitan Public Defender charging that respondent had violated Disciplinary Rule 7-107(B). The petition for discipline requested the Board to appoint a hearing panel to hear testimony, receive evidence and make findings of facts and order disciplinary action as deemed appropriate. The specific charges filed against Zimmermann alleged that he had violated DR 7-107,(B) and (E), relating to trial publicity by talking to the press about pending proceedings. The first instance involved a defendant charged with murder. Immediately after a preliminary hearing he purportedly engaged in an informal conversation with members of the news media which was reported in the local newspapers on the following day. In the second complaint he allegedly had a second discussion with the press after two defendants charged in a six (6) count indictment had been convicted of the charges, but prior to their sentencing hearing.

The first statement admittedly made by respondent to the media occurred outside of the courtroom immediately after a preliminary hearing at which the defendant was arraigned. Respondent commented to the assembled reporters that "the medical examiner said [the victim] was strangled, stabbed in the chest multiple times and had his throat slashed all the way across. The photographs of the body were pretty bad. We are considering asking for the death penalty. The defendant said he stabbed the victim multiple times in the chest before slashing his throat, al-

most from ear to ear." In the second case in a similar conversation with the press he was reported to have commented on the extreme torture suffered by the victim at the hands of the defendants. He said, "the verdicts reflected the mind of the jury for the community that such crimes against the elderly would not be tolerated and that he would ask the sentencing judge to impose maximum sentences on both defendants."

The Hearing Committee heard testimony of witnesses, statements of respondent and arguments of counsel. They reviewed the exhibits, the record of the proceedings and briefs of counsel, then reported their conclusions and findings. They were of the opinion that, in the first case, respondent, John Zimmermann, had violated DR 7-107(B) and should receive a private reprimand for his extrajudicial comments made to representatives of the media concerning the examination and report of the medical examiner and photographs of the body, neither of which had been introduced at the preliminary hearing. They found that the defendant's confession had been introduced at the hearing, therefore it was a public record and respondent's comments in reference to it were permissible.

With respect to the other complaint they found that respondent's extrajudicial comments after the trial did not violate DR 7-107(E) because it was not reasonably likely his remarks would affect the imposition of sentence in that case.

They held that in applying the Rules of Professional Responsibility, there also must be a rule of reason applicable to their interpretation. There was no intent on the part of the respondent to interfere with a fair trial in the first case or influence the sentence to be imposed by the trial judge in the second. It was their conclusion he was following the policy of the office of the District Attorney General by being accessible to the news media. When respondent became aware that his extrajudicial comments

in the first case had become the subject of a complaint to the Board of Professional Responsibility he made no further statements to the press until after the end of the trial. In the second case he intentionally did not comment to the media until after the trial was over although the sentencing phase had not been held. It was their conclusion that it was his intent to conduct himself properly.

They further held that as a public prosecutor, respondent had certain rights and responsibilities concerning the dissemination of public information. However, the Disciplinary Rules adopted by the Tennessee Supreme Court place specific restrictions on all attorneys relative to the dissemination of information concerning pending criminal trials, which must be governed by the delicate balance between the right to a fair trial on one hand and the right of free expression on the other.

Each of the parties appealed the decision of the Hearing Committee to the Chancery Court. Disciplinary counsel on behalf of the Board of Professional Responsibility complained that the private reprimand of respondent was insufficient and inappropriate based upon the facts and the alleged violations on the first complaint. As to the second they were of the opinion that the Hearing Committee erred in finding that respondent did not violate the Code of Professional Responsibility.

The petition of respondent complained that the Hearing Committee erred in finding him in violation of DR 7-107(B) in reference to Complaint No. 1. As an affirmative defense he submitted that the Hearing Committee's interpretation of DR 7-107 violated his First Amendment rights in that the record failed to show that the comments made by him posed a clear and present danger; a serious and imminent threat; or a reasonable likelihood of interfering with a fair trial of the defendant in that case.

At the conclusion of the hearing in Chancery Court the trial judge entered written findings of fact with his con-

clusions that the respondent technically violated Disciplinary Rule 7-107(B)and (E) in the first complaint and also technically violated DR 7-107(E) involving the second complaint. He further found that respondent's insistence was untenable that he was protected by the First Amendment to the Constitution in making the statements attributed to him. That those statements, as printed, were violations of the Sixth and Fourteenth Amendment rights of the first defendant. In reference to the second case he concluded there was a technical violation of DR 7-107(E) but that the trial judge in that case was not aware of respondent's remarks and was not influenced by them in the sentencing proceedings.

The court was of the opinion that respondent did not act maliciously or with intent to interfere with a fair trial in reference to the first complaint, or to influence the trial judge in imposing sentence in reference to the second. He concluded that the evidence did not preponderate against the Hearing Committee's judgment in the matter and confirmed the findings of that forum in their entirety as to the discipline imposed.

Each of the parties have, in turn, appealed to this Court. Counsel for the Board of Professional Responsibility frames the issue around the appropriate sanctions to be imposed upon an Assistant District Attorney General who knowingly and intentionally violates the Code of Professional Responsibility, specifically Disciplinary Rule 7-107(B), by making improper statements to the news media after preliminary hearing and before trial of a sensational murder case.

Respondent, in his brief, inquires whether his extrajudicial statements to the press relating the medical examiner's findings violate the Disciplinary Rules. Whether the statements by the Hearing Committee as a violation of the Disciplinary Rules warrant *punitive* action. (Emphasis ours). Whether DR 7-107, as it is applied in the present

case, violates his freedom of expression rights secured by the United States and Tennessee Constitutions.

We point out that under Rule 9, § 1.3 of this Court, the review of the judgment of the Hearing Committee in the trial court is on the transcript of the evidence before that committee, its findings and judgment and upon such other proof as either party may desire to introduce. The trial judge is to weigh the evidence and determine the facts by the preponderance of the proof. The review in this Court is *de novo* upon the transcript of the record from the Circuit or Chancery Court, which shall include the transcript of evidence before the hearing committee. We must presume, however, that the trial court was correct unless the preponderance of the evidence is contrary to his finding. *Gillock v. Bd. of Prof. Resp. of the Supreme Court*, 656 S.W.2d 365, 367 (Tenn. 1983).

Disciplinary counsel acting for the Board of Professional Responsibility, ably assisted by counsel pro hac vice, insists that the severity or leniency of the sanction imposed, which is the basis for their appeal, is not an issue of fact. Therefore, this Court is not bound by the decision of the Chancery Court on that issue. It is urged that the judgment of that court should be modified to order a suspension from the practice of law against respondent. It is their position that the private reprimand directed by the hearing panel and the Chancery Court is too lenient and does not give sufficient warning to respondent and other attorneys of the serious nature of the misconduct and aggravating circumstances surrounding the charges made against Mr. Zimmermann.

The record before us contains a concurring finding of fact with the exception that the hearing committee found respondent had violated DR 7-107(B) while the chancellor concluded there was a technical violation of both Sections B and E. Notwithstanding the judgments below, upon determining the existence of aggravating or mitigating cir-

cumstances, this Court may modify the judgment of the trial court. *Disciplinary Board v. Banks,* 641 S.W.2d 501, 504 (Tenn.1982) However, we are reluctant to substitute our judgment for that of two separate triers of fact who have reviewed the proof and heard the evidence in personam. See *Disciplinary Counsel v. Fitzgerald,* 607 S.W.2d 232, 234 (Tenn.1980). We adopt the statement made by the Hearing Committee in their judgment. "In applying the Rules of Professional Responsibility, there also must be a rule of reason applicable to their interpretation." The record clearly supports the findings of the trial judge that respondent was in technical violation of Disciplinary Rule 7-107(B) and (E) but that his conduct in discussing trial matters with the news media was neither malicious nor with the intent to interfere with the right to a fair trial of any of the defendants. The discipline imposed was adequate and appropriate. We are of the opinion his comments were not very well considered and, in order to avoid the possibility of violating an accused's constitutional rights, that it would be prudent for the District Attorney to review his "open policy with the media" in relation to the nature of the comments his staff is encouraged to communicate.

Respondent has raised three issues for review, the first two of which we find it necessary to mention only in passing. We have previously discussed the Hearing Committee's conclusions that respondent's extrajudicial comments to representatives of the media concerning the examination and report of the medical examiner and photographs of the victim's body violated DR 7-107(B). The simple answer to his second complaint is that the purpose of sanctions under the Disciplinary Rules is to *discipline* and not to *punish.* The third inquiry, requires further amplification and consideration, that is whether DR 7-107, as applied in the present case, violates the freedom of expression rights secured by the United States and Tennessee Constitutions. We are of the opinion that it does not.

There are two specific, though divergent, reasons why the strictures against trial publicity imposed by the Disciplinary Rules are not violative of an attorney's freedom of expression rights. In the case of *In Re, Rachmiel,* 449 A.2d 505 (N.J. 1982), under strikingly similar circumstances, the New Jersey Supreme Court held that the application of a disciplinary rule which proscribed attorneys involved in criminal cases from making statements that relate to "any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case" . . . did not constitute a violation of the Right to Free Speech under the First Amendment. In that case a former prosecutor, after he had returned to private practice, made comments concerning a criminal case which he had previously handled. A complaint was filed by the county prosecutor with the District Ethics Committee. The committee issued a formal complaint against *Rachmiel* and held hearings. A presentment was filed charging him, inter alia, with violation of DR 7-107(B) and (E).[1] The New Jersey Court, citing appropriate authorities, held:

> "In determining the validity of restrictions upon free speech, the constitutional analysis calls for the application of two demanding tests. The first is whether a substantial governmental interest is furthered by the restriction upon speech. (Citation omitted). The second requires that the restriction be no greater than is necessary or essential to protect the governmental interest involved. The application of these tests involves a balancing of the gravity and likelihood of the harm that would result from unfettered speech against the degree to which free speech would be inhibited if the restriction is applied. (Citations omitted). . . . [T]he restriction upon free speech

[1] The New Jersey rule is identical to Tennessee Supreme Court Rule 9.

> imposed by the Disciplinary Rule addresses a substantial governmental interest. That interest relates to the fairness and integrity of the administration of justice and becomes particularly compelling in the administration of the criminal justice system. (Citations omitted). . . . The rule in question furthers a substantial governmental interest in that it attempts to restrict speech that would be prejudicial or deleterious to the administration of criminal justice.
>
> The ethical rule at issue in this case imposes restraints upon a limited class of persons - attorneys for the prosecution or defense in a pending criminal matter. These persons have a unique role and responsibility in the administration of criminal justice and, therefore, have an extraordinary power to undermine or destroy the efficacy of the criminal justice system. (Citations omitted). . . . [S]uch attorneys are appropriately subject to carefully tailored restraints upon their free speech."

The court ruled that the prohibition applied only to that speech which is "reasonably likely" to interfere with or affect a fair trial. We adopt the reasoning of the New Jersey court on this issue.

There is a further reason why in this State there is no unreasonable restraint placed on the freedom of speech rights of an attorney admitted to practice law in accordance with the rules governing such matters.

The preamble to the Code of Professional Responsibility states in pertinent part:

> "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our le-

> gal system. A consequent obligation of lawyers is to maintain the highest standard of ethical conduct.
>
> In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the everchanging relationships of society.
>
> The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Because it is occasionally necessary to remind ourselves of the rigorous standards each of us must maintain as a member of the legal profession, Sections 3.1 and 3.2 of Rule 9 of the Rules of this Court also bear repetition:

> 3.1. The license to practice law in this State is a continuing proclamation by the court that the holder is fit to be entrusted with professional and

judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law.

3.2. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office, the Code of Professional Responsibility of the State of Tennessee, or T.C.A. §23-3-201, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

In *Petition for Tennessee Bar Association*, 539 S.W.2d 805 (Tenn.1976), at p. 809 Justice Harbison of this Court has traced the disciplinary rules promulgated by this Court from their origin. Rule 40 of the Court, providing for the appointment of members of the bar to investigate grievances or complaints against lawyers charged with misconduct was published at 192 Tenn. 827 and subsequently readopted as Rule 42. By order dated July 19, 1965, this Court, *acting upon a petition of the Tennessee Bar Association*, set up commissioners for the purpose of investigating complaints of unethical conduct and professional misconduct on the part of attorneys. To implement enforcement of the standards of professional ethics and responsibility, the order of July 19, 1965 directly involved the Board of Governors of the Tennessee Bar Association and local bar associations, in the manner set out in detail in that rule. The use of investigative committee reports under Rule 42 has received express sanction by the General Assembly, now encoded in T.C.A. §23-3-202. In 1974, Rule 42 was revised at the behest of the Tennessee Bar Association. Instead of relying upon the voluntary efforts

of the Bar Association, local bar associations and individual lawyers, the Court chose a method by which the financing of grievance investigations and enforcement of professional standards would be shifted to the entire membership of the State's legal profession and upon all persons holding a license to practice law in this State, with the exceptions set out in the Rule. New rules of the Court were adopted in 1981 and Rule 42 was replaced by current Rule 9.

Although this Court exercises the role of prescribing and seeking to enforce and uphold the standards of professional responsibility in this State, *Petition of Tennessee Bar Assoc.*, supra, p. 810, the Court has extended to any member of the profession the right to file a petition, at any reasonable time, to ask the Court to reconsider or modify its actions.

The Hearing Committee as well as the trial judge in this case have indicated a need for more precise guidelines for interpreting the applicability of DR 7-107 to extrajudicial statements in criminal cases. The Hearing Committee in its findings made note of the three tests adopted severally by courts in various jurisdictions to be used in such cases, that is, whether comments of counsel posed:

> (1) "[A] serious and imminent threat; (2) "a clear and present danger;" or (3) "a reasonable likelihood," of interfering with the fair trial of a defendant.

We are of the opinion that the above differences are more semantical than real. We have no difficulty in finding adequate guidelines within the framework of the rule itself. Throughout the text constant reference is made to the statements a "reasonable person" might make, "reasonably likely" to interfere with a fair trial. The rule is explicit. There is no reason to complicate it by the addition of abstruse court inculcated definitions.

We have been greatly benefited in reaching the conclusions announced here by the briefs of amici curiae, Na-

tional District Attorneys Association, the Tennessee District Attorneys General Conference and the Tennessee Association of Criminal Defense Lawyers. We express our appreciation for their assistance.

Respondent's challenge to the constitutionality of Disciplinary Rule 7-107 is found to be without merit. The judgment of the Chancery Court for Davidson County finding respondent to be in technical violation of Disciplinary Rule 7-107(B) and (E) and sustaining the hearing committee's verdict is affirmed by this Court. The costs of these proceedings will be paid equally by the Board of Professional Responsibility and respondent.

CHARLES H. O'BRIEN, JUSTICE

CONCUR:
Harbison, C.J.,
Fones & Cooper, JJ.

Concurring in Part,
Dissenting in Part,
Drowota, J.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

S/C No. 87-47-I

IN RE: JOHN ZIMMERMANN,
An Attorney Licensed and admitted to the practice of Law in Tennessee,
Respondent-Appellant,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY,
Appellant.

FOR PUBLICATION.

DAVIDSON CHANCERY
Hon. Aaron Brown, Chancellor.

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part. I agree with the majority opinion that DR 7-107 does not violate the freedom of expression rights secured by the United States and Tennessee Constitutions as applied in the present case. I disagree with the majority's finding that Respondent, John Zimmermann, was in technical violation of DR 7-107 and that "the discipline imposed [private reprimand] was adequate and appropriate." I further disagree with the majority when it states: 'We are of the opinion his [Zimmermann's] comments were not very well considered and, in order to avoid the possibility of violating an accused's constitutional rights, that it would be prudent for the District Attorney to review his 'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate."

DR 7-107 is entitled "Trial Publicity." Section (A) deals with extrajudicial statements made during the investiga-

tion of a criminal matter, Section (B) deals with extrajudicial statements made prior to trial, Section (D) deals with extrajudicial statements made during trial and Section (E) deals with extrajudicial statements made after trial and prior to the imposition of sentence. In this case we deal only with Sections (B) and (E).[1] Put in its simplest form, the technical violation of DR 7-107(B), as found by the majority in this case, is that a lawyer associated with the prosecution of a criminal matter, prior to commencement of trial, has made an extrajudicial statement that relates to: (4) the results of examinations or the refusal or failure of the accused to submit to examinations or tests, and (6)

---

[1] (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement, that a reasonable person would expect to be disseminated by means of public communication, and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

any opinion as to the guilt or innocence of the accused, the evidence or the merits of the case.

The Board of Professional Responsibility filed charges against John Zimmermann, an Assistant District Attorney General in Davidson County, alleging that he made improper extrajudicial statements to the news media about two pending criminal cases, which I shall refer to as the Sheffield case and the Emmitt and Haynes case. The Sheffield case involved the murder of a quadriplegic veteran in a Nashville cemetery by Sheffield. At his preliminary hearing Sheffield's confession was introduced, where he admitted stabbing the victim, Campbell. After the preliminary hearing, Zimmermann was questioned by reporters from the *Nashville Banner* and WSM radio. TV reporters and cameramen were also present. The following article appeared in the *Nashville Banner* about the Sheffield case:

> "The medical examiner said (Campbell) was strangled, stabbed in the chest multiple times and had his throat slashed all the way across," Assistant District Attorney General John Zimmermann said.
>
> "The photographs of the body were pretty bad. We're considering asking for the death penalty," Zimmermann said today.
>
> Once at the cemetery, Sheffield allegedly stabbed the victim "multiple times in the chest and slashed his throat," Zimmermann said after Wednesday's preliminary hearing in General Sessions Court.

The following article also appeared in *THE TENNESSEAN:*

> Assistant Attorney General John Zimmermann said outside the courtroom that Sheffield, 19, told police he attempted to strangle Campbell, 52, but the older man "wouldn't die".

> Then, according to Zimmermann, Sheffield said he stabbed Campbell "multiple times in the chest" before slashing his throat, almost from ear to ear.

With reference to the Sheffield case, the Hearing Committee found that Sheffield's confession (which was truly prejudicial) had been introduced at the preliminary hearing, therefore it was of public record and Zimmermann's comments concerning the confession were permissible. *See* DR 7-107 (B)(3). The Committee, however, found Zimmermann's comments to the media concerning the examination and report of the medical examiner and photographs of the body were in violation of DR 7-107(B)(4).

I am of the opinion that Zimmermann's statements regarding the medical examiner's findings did not violate DR 7-107(B)(4). It should be pointed out that in the Sheffield case the cause of death was not a contested issue, nor was the medical examiner's description of the injuries disputed, and the medical report had no bearing on the guilt or innocence of Sheffield. The autopsy report is a public record, T.C.A. §38-7-110(C), and therefore, an attorney may state the medical examiner's findings. DR 7-107(B)(4) deals with "results of any examinations or tests or the refusal or failure of the *accused* to submit to examinations or tests" [emphasis added]. Section (B)(4) is meant to prevent comments about tests or refusal to submit to tests by the accused, not a victim. For example, the failure of a defendant to pass or to take a polygraph test cannot be commented upon, but here we have an examination of a victim, not the defendant. With reference to Zimmermann's statement that "the photographs of the body were pretty bad," the photographs were never displayed or offered to the media by Zimmermann, and they were, therefore, not disseminated to the public. The majority opinion fails to cite what specific rule prohibits such a statement by Zimmermann and how it threatened the Defendant's fair trial.

Emmitt and Haynes were convicted in separate jury trials of assault with intent to commit first degree murder, aggravated kidnapping, aggravated rape, armed robbery, and first degree burglary. The victim was an 82-year-old senior citizen volunteer worker. Before the sentencing hearing, the following statements were attributed to Zimmermann in a local newspaper:

> "I think these verdicts speak the mind of the jury for the community, in that crimes like this against the elderly are not going to be tolerated."
>
> ". . . will ask Judge Sterling Gray in a sentencing hearing . . . to impose the maximum sentences on both Emmitt and Haynes and to order those terms consecutively."
>
> "This woman suffered torture at the hands of these two men for about three hours . . . . As far as I am concerned, there is nothing worse they could have done short of killing her."

With reference to the Emmitt and Haynes case, the Hearing Committee determined there was no violation of DR 7-107(E) because it was not reasonably likely that Zimmermann's remarks had any effect on the imposition of the sentence in the case. Judge Gray testified at the disciplinary hearing that he was unaware of any extrajudicial statements made by Zimmermann and was not influenced by anything said or done by Zimmermann outside the courtroom.

Zimmermann's statements to the press were not a staged press conference, he did not initiate the discussion, he responded only to questions propounded to him by the news media representatives outside the courtroom. The policy of the District Attorney's office was to speak openly and courteously with all members of the press consistent with the code of professional responsibility. This John Zim-

mermann did and he should not now be reprimanded for his actions.

The majority opinion points out that "[t]he hearing committee as well as the trial judge in this case has indicated a need for more precise guidelines for interpreting the applicability of DR 7-107 to extrajudicial statements in criminal cases." The hearing committee noted three tests or standards adopted by courts in other jurisdictions which lend guidance in applying DR 7-107. The three tests are, whether extrajudicial statements of counsel posed: (1) a serious and imminent threat to the fair trial of a defendant, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th cir. 1975) *cert. den.*, 427 U.S. 912 (1976);[2] (2) a clear and present danger in the fair trial of the defendant, *Markfield v. New York*, 40 App. Div.2d 516, 370 N.Y.S.2d 82 (1975); or (3) a reasonable likelihood of interfering with the fair trial of a defendant, *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979). The parties and Amici have asked this Court to give them and the Bar of this State some guidance for interpreting DR 7-107's applicability to extrajudicial statements. The majority opinion responds to the request by stating: "We have no difficulty in finding adequate guidelines within the context of the rule itself." This response by the majority that "[t]he rule is explicit", begs the question. To merely say that "[t]hroughout the text constant reference is made to the statements a 'reasonable person' might make, 'reasonably likely' to interfere with a fair trial," is not an adequate response to the guidance sought by the bench and bar. The citation to a "reasonable person" found in DR 7-107, Sections (A), (B), (D), (E), (G) and (H), has nothing to do with the extra-

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[2] *See Ruggieri v. Johns-Manville Products Corp.*, 503 F.Supp. 1036 (R.I. 1980); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 476-477 (5th Cir. 1980) *en banc*; *Shadid v. Jackson*, 521 F.Supp. 85 (E.D. Tex. 1981); *In re: Lasswell*, 673 P.2d 855 (Or. 1983); *Kemner v. Monsanto Company*, 112 Ill.2d 223, 492 N.E.2d 1327, 1337 (1986).

judicial statement of counsel but refers to what "a reasonable person would expect to be disseminated by means of public communication." In this case there was an obvious expectation that Zimmermann's statements would be disseminated by means of public communication, since the media approached Zimmermann after the preliminary hearing and sought statements from him. The "reasonable person" reference in Section (B) has nothing to do with giving guidance to the bar concerning extrajudicial statements made prior to trial. The reference to "reasonably likely" in the majority opinion is not found in Section (B), therefore it is difficult to see how the rule can be said to be explicit.

The bench and bar have asked for guidance in interpreting DR 7-107's applicability to extrajudicial statements. I am of the opinion that we should adopt a standard which balances the rights of the accused to a fair trial with the right of a free press and the public's right to information and knowledge.

The majority opinion states "that it would be prudent for the District Attorney to review his 'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate." This reasoning by the majority is why I feel guidelines for DR 7-107(B) should be established by this Court. The majority opinion does what respondent seeks to avoid - a stifling of the public's right to know by creating a chilling effect on prosecutors with the suggestion to "review his 'open policy with the media' ". There is a delicate balance between a prosecutor's right to speak and the right of the public and the press to have access to information, and the rights of the individual accused of a crime and a defendant's right to a fair trial. I am of the opinion that Zimmermann's statements should be reviewed by the test of "whether his comments posed a clear and present danger to the fair trial of the defendant." Under such a test, it is clear that Zimmermann's statements to the media did not pose a

clear and present danger to the defendant's fair trial and he did not violate DR 7-107. I would reverse the decision of the Chancery Court recommending a private reprimand. I would dismiss the complaint filed by the Board of Professional Responsibility for I find no violation of DR 7-107.

FRANK F. DROWOTA, III, Justice.

APPENDIX B

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE - PART III

NO. 86-2120-III

IN RE: JOHN ZIMMERMANN,

Respondent.

FINDING

In the case at Bar, the Court, after a complete review of the record, referring to notes taken on testimony adduced in open Court, argument of counsel in the way of supplementing previous well-prepared briefs, the Court concludes the Respondent technically violated Disciplinary Rule 7-107 (B) and (E) in the Sheffield matter.

The Court further finds the Respondent's insistence that he is protected in making the statements attributed to him by the First Amendment to the Constitution is not tenable. The statements as printed definitely violated defendants constitutional right in violation of the 6th and 14th Amendment to the Constitution. "The 1st Amendment can be abridged if in direct conflict with the 6th and 14th Amendment." 522 F.2nd 248.

In the Haynes/Emmitt case the Court feels the Respondent also technically violated rule D.R. 7-107 (E), however, the Honorable Sterling Gray, the trial Judge in such case testified he was not aware of such remarks,and consequently not influenced by them.

Knowing the reputation of Judge Gray and the other trial Judges in the State it would be difficult for me to believe an ex-parte statement outside the Courtroom would

or could influence their decision, however the rule has been announced, promulgated and violated.

The Court got the impression, from the evidence that the District Attorney General, Honorable Tom Shriver, has in the past insisted upon a policy in his office of open and candid report to members of the press. As admirable that this approach might be, the Court got the further impression that neither the Attorney General, or his assistants were aware of the definite impact of the rules.

The Court is of the opinion at such time as there is a complete understanding of what is to be expected of the parties in position of representing the State in Criminal prosecution as directed by the Supreme Court, there will be no further reason for a disciplinary hearing involving the Attorney General's Office.

The Court feels the Respondent did not act maliciously or with the intent to interfere with a fair trial for Sheffield, or to influence Judge Gray in imposing a sentence in the Haynes Emmitt matter.

In conclusion the court taking all matters into consideration and especially reviewing the evidence adduced in open Court and the entire record, feel that neither party has carried the preponderance of evidence necessary to over-turn the hearing committee's verdict in the matter, therefore, the Court confirms their finding of the 22nd day of August, 1986, in its entire form.

Prepare decree in conformity with the finding herein and present for entry.

Done at Memphis, Tennessee this 7th day of April 1987.

_____

AARON C. BROWN
CHANCELLOR - BY DESIGNATION

cc: Honorable Joseph L. Mercer, II
Board of Professional Responsibility
1101 Kermit Drive - Suite 405
Nashville, TN 37217

Honorable William M. Leech, Jr.
2100 - One Commerce Place
Nashville, TN 37239

Clerk and Master
Chancery Court
Metropolitan Courthouse
Nashville, TN 37201

APPENDIX C

IN DISCIPLINARY DISTRICT V
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

DOCKET NO. 85-272-5

IN RE: JOHN ZIMMERMANN,
Respondent, An Attorney
Licensed and Admitted to the
Practice of Law in Tennessee

JUDGMENT OF THE HEARING COMMITTEE

This matter is before the Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee upon a Petition for Discipline filed pursuant to Rule 9, Rules of the Supreme Court, against John Zimmerman. The Hearing Committee, consisting of Robert L. Echols, Chairman, Richard H. Dinkins, and Jack W. Robinson, submits its judgment in this cause in accordance with the following:

1. STATEMENT OF THE CASE

The Petition for Discipline was filed on December 5, 1985, and service of process was served on the Respondent by certified mail. The Answer of the Respondent was filed on January 8, 1986. Interrogatories were served upon the Respondent by mail on January 13, 1986, and Respondent's Answers to the Interrogatories were filed on February 19, 1986. This matter was set for hearing originally on May 13, 1986, but was continued at the request of counsel for the Respondent until June 16, 1986. At the hearing, the Respondent was represented by Mr. William M. Leech, Jr.

and Ms. Laurie A. Dollhofer. The disciplinary counsel was Joseph L. Mercer II.

The Petition for Discipline filed against the Respondent, an Assistant District Attorney General in Davidson County, Tennessee, alleges he made certain improper extra-judicial statements to representatives of the news media in violation of Disciplinary Rule 7-107(B) and (E). The charges refer to two pending criminal cases in Davidson County in which the Respondent was acting as prosecutor. In both cases the remarks were made in the hallway outside the courtroom while Respondent was being interviewed by representatives of the news media. There is no dispute as to the material facts in either case.

Respondent admits making the remarks attributed to him in the local newspapers and admits that the remarks were extra-judicial. He also admits that he expected his comments to be disseminated to the public by the media. Respondent states that the statements made by him did not violate the provisions of D.R. 7-107 and that he is protected in making such statements by the First Amendment.

THE SHEFFIELD MATTER

In June of 1984 a preliminary hearing was held in a case involving Larry Sheffield, an alleged male prostitute who was charged with a brutal first degree murder of a quadriplegic veteran in a Nashville cemetery. Immediately following the hearing, Respondent was questioned by several media reporters about the case. It is alleged that his remarks violated D.R. 7-107(B) in that they tended to inflame the passions of the public and made it difficult for Sheffield to receive a fair trial because of the prejudicial influence which the pre-trial publicity had upon potential jurors.

Specifically, the following statements were attributed to the Respondent by the local newspapers:

"Sheffield - told police he attempted to strangle Campbell . . . but (he) wouldn't die".

"Sheffield said he stabbed Campbell multiple times in the chest and slashed his throat."

"The medical examiner said (Campbell) was strangled, stabbed in the chest multiple times and had his throat slashed all the way across.

"The photographs of the lady were pretty bad. We're considering asking for the death penalty."

"Once at the cemetery, Sheffield allegedly stabbed the victim multiple times in the chest and slashed his throat."

THE HAYNES/EMMITT MATTER

In October of 1984 co-defendants Dwayne Haynes and Richard Emmitt were convicted in separate jury trials of assault with intent to commit first degree murder, aggravated kidnapping, aggravated rape, armed robbery, and first degree burglary. The victim was an 82 year old senior citizen volunteer worker. After the second trial (Emmitt) and before the sentencing hearing, Respondent spoke with representatives of the media about both cases. It is alleged that his remarks violated D.R. 7-107(E) in that it was reasonably likely that the statements could influence the imposition of the sentences to be given by the trial Judge in the pending cases.

The following statements attributed to the Respondent appeared the next day in a local newspaper:

"I think these verdicts speak the mind of the jury for the community, in that crimes like this against the elderly are not going to be tolerated."

". . . will ask Judge Sterling Gray in a sentencing hearing . . . to impose the maximum sentences

on both Emmitt and Haynes and to order those terms consecutively."

"This woman suffered torture at the hands of these two men for about three hours. . . . As far as I am concerned, there is nothing worse they could have done short of killing her."

THE HEARING

Judge Sterling Gray testified at the disciplinary hearing concerning the Haynes/Emmitt cases. He testified that he was unaware of any extra-judicial statements made by the Respondent in either case or of the comments of the Respondents which appeared in a local newspaper article following the Emmitt trial. Although he did impose sentences of 125 years, he was not influenced by anything said or done by the Respondent outside the courtroom. He further testified that Respondent was a competent, aggressive prosecutor and he was aware of no disciplinary violations committed by him.

Respondent's supervisor, District Attorney General Tom Shriver, testified at the disciplinary hearing that it was the policy of his office to be open and candid with all members of the press. He encouraged the Assistant District Attorneys on his staff to answer questions from the media within the permissible bounds of the disciplinary rules. He stated the remarks of the Respondent on matters contained in Sheffield's confession were permissible because the confession had been introduced in the preliminary hearing.

Respondent stated at the hearing that in the Sheffield case his comments were not designed to prejudice jurors and that he felt justified in commenting on matters which had been brought out in the prior preliminary hearing. He did not call a press conference and responded only to questions put to him by the news media representatives outside the courtroom. He believed he was following the

policy of the DA's office by being open and candid with the press. In the Haynes/Emmitt cases, Respondent stated he purposely waited until after trial (but before sentencing) to make any statement to the press so as to avoid the possibility of influencing the jury in the case. He did not intend to affect Judge Gray's decision regarding the sentences to be imposed and thought he was being careful about his extra-judicial statements by waiting until after the trial.

All witnesses were examined by counsel for the parties and the panel members.

CONCLUSIONS OF THE HEARING COMMITTEE

After having heard the testimony of witnesses, arguments of counsel and statements of the Respondent, and having reviewed the exhibits, briefs of counsel and the entire record in this cause, it is the conclusion of the Hearing Committee that the Respondent, John Zimmerman, has violated D.R. 7-107(B). The Respondent should receive a private reprimand for his extra-judicial comments made to representatives of the media in the Sheffield matter concerning the examination and report of the medical examiner and photographs of the body, neither of which had been introduced in the preliminary hearing. Since Sheffield's confession had been introduced at the hearing, it became a public record and Respondents' comments thereon were permissible.

With respect to the Haynes/Emmitt matter, Respondent's extra-judicial comments after the trial did not violate D.R. 7-107(E) because it was not reasonably likely that they would affect the imposition of sentence in the case.

In applying the rules of professional responsibility, there also must be a rule of reason applicable to their interpretation. There was no intent on the part of the Respondent to interfere with a fair trial for Sheffield or to influence

the sentence to be imposed by Judge Gray in the Haynes/Emmitt matter. He thought he was following the policy of his office in being accessible to the news media as expressed by General Shriver. When Respondent became aware that his extra-judicial comments in the Sheffield case had become the subject of a complaint to the Board of Professional Responsibility, he testified that he made no further statements to the press until the conclusion of the trial. In the Haynes/Emmitt matter, he intentionally did not comment to the media until after the trial was over (but before the sentencing). It is apparent that he wants to do what is right.

As a public prosecutor, Respondent has certain rights and responsibilities concerning the dissemination of public information. The disciplinary rules adopted by the Tennessee Supreme Court, however, place specific restrictions on all attorneys for the dissemination of information concerning pending criminal trials. Admittedly, it is a delicate balance between the right to a fair trial and the right of free expression.

As pointed out by counsel for the Respondent, several courts have held that the First Amendment of the Constitution requires a more restrictive interpretation of D.R. 7-107 in order to adequately protect the right of free speech. Basically, those courts have adopted one of three tests to be used in interpreting an attorney's extra-judicial comments under D.R. 7-107. The three tests differ with regard to the degree of threatened harm required before discipline can be imposed:

(1) Whether the comments posed a "serious and emminent threat" to the fair trial of a defendant;

(2) Whether the comments posed a "clear and present danger" to the fair trial of a defendant;

(3) Whether the comments posed a "reasonable likelihood" of interfering with the fair trial of a defendant.

Until the Tennessee Supreme Court amends the language of D.R. 7-107 or furnishes other guidelines for interpreting its applicability to extra-judicial statements in criminal cases, the Hearing Committee must look to the present provisions of the rule and the circumstances of each case. For the reasons stated herein, the Hearing Committee recommends a private reprimand in this case.

This 22nd day of August, 1986.

Robert L. Echols, Chairman

Richard H. Dinkins

Jack W. Robinson